ZAIDON SHARIFF

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL JC
[CRIMINAL APPEAL NO: 41-23 OF 1996]
5 AUGUST 1996

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Minimum and maximum sentence prescribed - Duty of Court in determining appropriate sentence in each case.*

CRIMINAL PROCEDURE: *Plea of guilty - Sentence - Discretion of trial Court in determining sentence - Whether discretion absolute - When may appellate Court interfere.*

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Whether excessive - Deterrent sentence - Whether all drug offences need deterrent sentence - Whether facts of each case should be considered by trial Court - Quantity and type of drugs - Whether relevant in determining appropriate sentence.*

CRIMINAL PROCEDURE: *Sentence - Previous convictions - Gap principle - Time gap between previous and present offences - Whether a mitigating factor.*

CRIMINAL PROCEDURE: *Sentence - Plea of guilty - Reduction principle - Credit or discount - When and how to be given to accused for pleading guilty.*

This was an appeal by the accused against the sentence of the Magistrates' Court imprisoning him for nine months for the offence of possession of cannabis weighing 0.04g. The accused had pleaded guilty to the charge in the Magistrates' Court. The main issues before the High Court were: (i) whether the Magistrate had erred in taking into account a previous conviction of the accused; and (ii) whether the type and weight of the drug warranted the sentence imposed. The accused's previous conviction was for an offence of theft under s. 379 of the Penal Code.

Held:

[1] The phrase "pass sentence according to law" in s. 173(m)(2) of the Criminal Procedure Code (FMS Cap 6) means that the sentence imposed must not only be within the ambit of the punishable section, but must also have been assessed and passed in accordance with established judicial principles.

[2] A plea of guilt is a mitigating factor. In assessing sentences, one of the main factors to be considered is whether the convicted person is a first offender. Before passing sentence, the Court is required to call for evidence of information on the background, antecedent, and character of the convict. Such facts will form the basis upon which the adequacy or otherwise of the sentence can be reviewed on appeal.

[3] It is an accepted rule of practice that the accused should be given credit or discount for pleading guilty, not on the maximum imposed by the law, but on a sentence which would have been imposed if he had claimed trial and had been found guilty. This principle warrants consideration if it is desired to impose a custodial sentence. It is not a rule to be strictly applied, as the Court may, in exercising its discretion, refuse to grant any discount in appropriate cases.

[4] The right to impose punishment on the guilty party is absolutely the discretion of the trial Court. It will exercise that power judicially, and will not tolerate even a semblance of encroachment either by the prosecution or the defence. If a sentence is excessive or inadequate to such an extent as to satisfy an appellate Court that when it was passed there was a failure to apply the right principles, then intervention by the appellate Court will be justified.

[5] The appropriate sentence for each drug offence depends on its own peculiar facts, in particular, the weight of the drugs which plays a significant role in assessing the appropriate sentence. This is also manifested by the fact that the Dangerous Drugs Act 1952 itself prescribes different penalties depending on the weight and nature of the drug involved.

[6] A previous conviction is to be taken into consideration only if it is of a similar nature with the current charge. In the instant case, the accused's clean record since his last conviction in 1986 is a mitigating factor. The rationale of the gap principle is that the offender has made an effort to rehabilitate himself.

Per curiam:

[1] A mitigation plea should not be treated as a ritualistic step by an accused following a conviction only to be rejected the moment it is uttered. It merits due consideration in the light of the facts of the case and, more so, when it is not contradicted by the prosecution.

[Appeal allowed; sentence substituted with a fine of RM1,500 in default six months' imprisonment]

Cases referred to:
Re Chong Cheng Hoe & Ors. [1966] 2 MLJ 252 ***(foll)***
PP v. Jafa bin Daud [1981] 1 MLJ 315 ***(foll)***
Phillip Lau Chee Heng v. PP [1988] 3 MLJ 107 ***(foll)***
New Tuck Shen v. PP [1982] 1 MLJ 27 ***(foll)***
R v. Ball 35 Cr. App R 164 ***(refd)***
PP v. Chean Tin [1939] MLJ 226 ***(foll)***
R v. Leo De Cruz [1935] MLJ 1 ***(foll)***
R v. Teo Cheng Lian [1949] MLJ 170 ***(foll)***
Abu Bakar bin Alif v. R [1953] MLJ 19 ***(foll)***
Re Vir Singh (1898) SSLR Supp. 6 ***(foll)***
Sau Soo Kin v. PP [1975] 2 MLJ 134 ***(foll)***
PP v. Ravindran & Ors. [1993] 1 MLJ 45 ***(foll)***
Mohamad Abdullah Ang Swee Keng v. PP [1988] 1 MLJ 167 ***(foll)***
Lee Say & Ors. v. PP [1985] 2 CLJ 155 ***(foll)***
Oloofen v. PP [1964] MLJ 305 ***(foll)***
PP v. Ang Soon Huat (Mallal's Digest, 4th Edn. 1994 Reissue, Vol. 5, No 2378) ***(refd)***
R v. Nuttall [1908] 1 Cr. App. Rep. 180 ***(foll)***
R v. Bibbings [1918] 13 Cr. App. Rep. 205 ***(foll)***
R v. Goodwin and Wilkinson [1910] 12 Cr. App. Rep. 85 ***(foll)***
Mohamed bin Abdul Rahman v. PP [1979] 1 MLJ 252 ***(foll)***
R v. Gunthrip [1925] 19 Cr. App. Rep. 45 ***(refd)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 70 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(m)(2)
Dangerous Drugs Act 1952, s. 6
Penal Code, s. 379

Other sources referred to:
Principles of Sentencing, D.A. Thomas, p. 179

For the appellant - Nor Hisham Nor Hashim; M/s. Nor Hisham & Co.
For the respondent - Anslem Fernandez; DPP

JUDGMENT

Augustine Paul JC:

This was an appeal by the accused (the appellant) against the sentence of nine months' imprisonment passed by the learned Magistrate, Magistrates' Court, Melaka on the following charge:

> Bahawa kamu pada 22.3.96 jam 4.20 petang berada di hadapan Balai Raya Batu 2 Limbongan di dalam Daerah Melaka Tengah di dalam Negeri Melaka sebagai seorang yang tidak dikecualikan dibawah Bahagian IV Akta Dadah Berbahaya 1952 (Akta 234 semakan 1980) atau sebarang peraturan yang dibuat dibawahnya kamu telah memiliki dadah bahaya ganja berat bersih 0.04 gram yang mana disenaraikan di Bahagian III Jadual Pertama dengan itu kamu telah melakukan kesalahan dibawah s. 6 Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah seksyen dan akta yang sama.

Upon the charge being read and explained to the appellant, he had pleaded guilty and understood the nature and consequences of his plea. The facts tendered by the prosecution were that on 22 March 1996 at about 4.20pm, the complainant, together with a police party, detained the appellant in front of Balai Raya at 2nd Milestone, Limbongan, Melaka. On searching his person a bundle of 'rokok daun', tobacco and dried leaves, suspected to be ganja, were recovered from his left trousers pocket. The complainant made a police report as per Tengkera Report No. 771/96 in respect of the arrest and seizure of the exhibits. The exhibits were sent to the Chemistry Department for analysis and the suspected items were confirmed to contain ganja (cannabis) weighing 0.04 grams. In his plea in mitigation before sentence the appellant said that he regretted what he had done and promised not to repeat the offence. He has a wife and two children aged three and one to support. While his wife is employed as a clerk in Syarikat Melaka Jaya he is working as piling labourer with an income of RM1,000 per month. He has also purchased a house on a loan which has to be repaid.

After having recorded a conviction the learned Magistrate took into account the following factors before imposing sentence:

(i) the guilty plea of the appellant had saved time and expenses;

(ii) drug offences require a deterrent sentence;

(iii) the appellant had a previous conviction for an offence under s. 379 of the Penal Code in 1986 for which he was sentenced to one day's imprisonment and a fine of RM1,000; and

(iv) the previous conviction did not seem to have had the desired effect on the appellant.

He then concluded that, in the circumstance he ought to impose a longer custodial sentence than the one meted out for the previous offence.

The grounds of appeal may be summarised under two issues as follows:

(i) whether the learned Magistrate had erred in law and in fact in taking into account the previous conviction which should have no bearing on the present offence; and

(ii) whether the type and weight of the drugs for which the appellant had been found guilty warranted the sentence imposed.

The relevant provision of law dealing with the imposition of sentences in the Magistrates' Courts is s. 173(m)(2) of the Criminal Procedure Code which reads as follows:

> If the Court finds the accused guilty or if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law.

The phrase "pass sentence according to law" in the subsection adverted to means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chong Cheng Hoe & Ors*. [1966] 2 MLJ 252; *PP v. Jafa bin Daud* [1981] 1 MLJ 315 and *Phillip Lau Chee Heng v. PP* [1988] 3 MLJ 107). The right to determine the quantum of punishment on a guilty party is absolutely in the discretion of the trial Court. It will exercise that power judicially and will not tolerate any encroachment or even semblance of encroachment by either the prosecution or the defence in respect of that right (see *New Tuck Shen v. PP* [1982] 1 MLJ 27). In the celebrated case of *R v. Ball* 35 Cr. App. R 164 the Court of Criminal Appeal restated the principles which should guide a Court in considering the appropriate sentence that should be passed in the following terse terms:

> In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that, if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe.

In assessing sentence one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence a Court is required to call for evidence of information regarding the background, antecedent and character of the accused (see *PP v. Jafa bin Daud* [1981] 1 MLJ 315).

The facts recorded will form the basis upon which the adequacy or otherwise of the sentence could be reviewed on appeal (see *PP v. Chean Tin* [1939] MLJ 226). The principles governing the outcome of an appeal against sentence are well-settled. In *R v. Leo De Cruz* [1935] MLJ 1 Huggard CJ said at the same page:

> In regard to appeals against sentence it has been laid down that the Court will not interfere with the sentence, unless the Judge has proceeded on wrong principles or given undue weight to some of the evidence.

Gordon-Smith J said in *R v. Teo Cheng Lian* [1949] MLJ 170 at p. 171,

> There must be a manifest error either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances, before the higher Court interferes with the discretion undoubtedly vested in the lower Court.

If a sentence is excessive or inadequate to such an extent as to satisfy an appellate Court that when it was passed there was a failure to apply the right principles then intervention by the Court is justified (see *Abu Bakar bin Alif v. R* [1953]. In *re Vir Singh* [1898] SSLR Supp. 6 Jackson JC said,

> I never interfere with a Magistrate's sentence unless a very strong case of error, prejudice, and severity based on wrong principles, can be shown to me.

I shall now consider whether the sentence imposed by the learned Magistrate is in line with established judicial principles. He had rightly taken into account the guilty plea of the appellant. A plea of guilt is a mitigating factor as it not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses (see *Sau Soo Kin v. PP* [1975] 2 MLJ 134). However, even if a custodial sentence is justifiable I do not think that the sentence imposed on the appellant is in accordance with the reduction that can be allowed in assessing sentence following a guilty plea. It is an accepted rule of practice that an accused person should be given credit or discount for pleading guilty (see *PP v. Ravindran & Ors.* [1993] 1 MLJ 45). It is important to remember that the credit or discount to be given in favour of the accused person is not on the maximum imposed by law, which is five years' imprisonment in the appeal before me, but rather on a sentence which would have been imposed on the accused if he had claimed trial and had been found guilty. In this regard Mohamed Azmi SCJ said in *Mohamad Abdullah Ang Swee Keng v. PP* [1988] 1 MLJ 167 at p. 171,

> It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.

I must add that this reduction principle should not be slavishly applied in every case where an accused person pleads guilty. It is superfluous to state that it warrants consideration only if, in the first instance, it is desired to impose a custodial sentence. Be that as it may, this rule is not a strict rule as the Court may, in the exercise of its discretion, refuse to grant any discount in appropriate cases (see *Lee Say & Ors. v. PP* [1985] 2 CLJ 155).

In my opinion the learned Magistrate's view that drug offences require a deterrent sentence is too wide and broad a statement. The appropriate sentence for each drug offence depends on its own peculiar circumstances. In particular the weight of the drugs found on a person plays a significant role in assessing sentence. In *Oloofen v. PP* [1964] MLJ 305 Wee Chong Jin CJ emphasised

the consideration to be given to the quantity of drugs involved in drug offences in assessing sentence. The same guideline applies even to more serious drug offences. In *PP v. Ang Soon Huat* (*Mallal's Digest* 4th. Ed. 1994 Reissue Vol. 5 No. 2378) it was held that in drug trafficking cases the sentence should be proportionate to the gravity of the offence, which is the quantity of the drugs that was being trafficked. This is also manifested by the fact that the Dangerous Drugs Act 1952 (the Act) itself prescribes different penalties for drug offences depending on the weight of drugs involved. In *Mohamed bin Abdul Rahman v. PP* [1979] 1 MLJ 252 Syed Othman J (as he then was) substituted a sentence of six months' imprisonment for possession of 0.10 grams of heroin with a fine of RM400 in default four months' imprisonment. Furthermore, the penalty under the Act is also dependent on the nature of the drugs involved. For example, an offence for possession of ganja attracts lighter sanctions than one for possession of heroin under the Act. As the dangerous drugs involved in this appeal is ganja and its weight is only 0.04 grams the learned Magistrate ought to have taken these factors into account in assessing sentence. Evidently, he was swayed by the overstatement that drug offences require a deterrent sentence.

A more serious objection to the sentence imposed by the learned Magistrate lies in the undue emphasis he placed on the 1986 conviction of the appellant for an offence under s. 379 of the Penal Code. This previous conviction of the appellant was obviously the driving force behind the sentence imposed on the appellant. It is settled law that a previous conviction is to be taken into consideration in assessing sentence only if the previous offence was of a similar nature as the one with which an accused is presently charged. In this regard Mohamed Azmi J (as he then was) said in *PP v. Jafa bin Daud* [1981] 1 MLJ 315 at p. 316,

> Where the convicted person has previous records and admits them as correct, the Court must consider whether the offence or offences committed previously were of a similar nature as the one with which he is presently charged. The Court must then consider the sentences imposed in the previous convictions for similar offences to determine whether they have had any deterrent effect on him. Where he is found to be a persistent offender for a similar type of offences, then it is in the interest of justice that a deterrent sentence should be passed ... .

In any event the fact that there has been a ten-year gap in the appellant's criminal record has not been duly appreciated by the learned Magistrate. The appellant's clean record since his last conviction in 1986 ought to have operated as a mitigating rather than as an aggravating factor. The rationale of the gap principle is that the offender has made an effort to rehabilitate himself and it should, accordingly, operate in his favour. In this regard, D.A. Thomas in his book entitled *Principles of Sentencing* said, at p. 179:

> The fact that an offender who has a criminal record has made an effort to 'go straight' since his last conviction or release from prison normally counts as a substantial mitigating factor if he subsequently commits an offence. In the case where the previous offences were trivial and committed in the long distant past, the Court will normally disregard them entirely and treat the offender as a man of previous good character. Where the previous convictions are more numerous or are for offences of a more serious character, the existence of a period free from conviction immediately before the commission of the present offence still has substantial mitigating effect. Clearly, the longer the period, the more effect it will have in mitigation, but while in some of the cases illustrating this point the period may be as long as twelve years, the Court will normally give credit for much shorter periods. In *Rosa*, a man of 41 sentenced to four years for housebreaking had ten previous convictions for dishonesty and violence, and had on one occasion been sentenced to seven years' imprisonment for wounding with intent. After his release from this sentence he had married, and in the following four years had been convicted only once in respect of a minor offence for which he was fined, and achieved a work record which was 'distinctly to his credit'. In view of the appellant's effort to reform, the sentence was reduced to two years' imprisonment.

The gap principle has received judicial recognition in a plethora of cases. See, for example, *R v. Nuttall* [1908] 1 Cr. App. Rep. 180 and *R v. Bibbings* [1918] 13 Cr. App. Rep. 205. In *R v. Goodwin and Wilkinson* [1910] 12 Cr. App. Rep. 85 it was held that a period of honest work between the termination of a sentence and subsequent conviction ought to be taken into account in passing sentence for the latter. In *R v. Gunthrip* [1925] 19 Cr. App. Rep. 45 the sentence was mitigated in view of the gap of three years' crime-free life between the two convictions.

I also took into account the plea in mitigation of the appellant which the learned Magistrate failed to consider. A mitigation plea should not be treated as a ritualistic step to be summarily rejected the moment it is made. It is a constituent element of the sentencing process. It merits due consideration in the light of the facts of each case, and more so when it is not contradicted by the prosecution as in this case. In this regard useful reference may be made to *Raja Izzuddin Shah v. PP* [1979] 1 MLJ 70 where Hashim Yeop Sani J (as he then was) said at the same page:

> No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.

For the reasons adumbrated I was of the view that the sentence of nine months' imprisonment imposed by the learned Magistrate on the appellant is not only manifestly excessive but also wrong in law and that a proper sentence should have been a non-custodial one. Accordingly I set aside the sentence imposed by him and substituted it with a fine of RM1,500 in default six months'

imprisonment. I must add that the learned Deputy Public Prosecutor did not seek to support the sentence imposed. I take this opportunity to commend the learned Deputy for the stand taken by him to uphold justice which is in the spirit of the role of the office of the Attorney-General as the guardian of public interest.

Reported by Aslam Zainuddin